EME COURT, U. S.
Clerk, Supreme Court, U.S.
FILED
OCT 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

THE SCHWARZENBACH-HUBER COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, THE SCHWARZENBACH-HUBER COMPANY IN OPPOSITION

MARSHALL C. BERGER,
Attorney for Respondent, The Schwarzenbach-Huber Company,
767 Fifth Avenue,
New York, New York 10022.

WEIL, GOTSHAL & MANGES,
ROBERT ABELOW,
Of Counsel.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
(1) The Union's purported majority	3
(a) The size of the unit	3
(b) The Cards in the Possession of the Union	4
(c) The Validity of the Cards	5
(2) The Employer's Purported Bad Faith	8
(3) The Effects of the Employer's Purported Unfair Labor Practices on a New Election	8
ARGUMENT—The decision of the court below is not in conflict with the Gissel Packing decision	14
1. Did the Union Have a Majority	15
2. Was the Employer's Claim that the Union Lacked a Majority Made in Bad Faith?	18
3. Is the Bargaining Order in this Case an Appropriate Remedy for Enforcing the Act?	19
CONCLUSION	22

Case Cited

NLRB v. Gissel Packing Co., 23 L. Ed. 2d 547 (1969) 14-16, 18-21

PAGE

Statute Cited

National Labor Relations Act:

Secs. 8(a)(1), (2) and (5) 2

Sec. 8(a)(5) 8

Supreme Court of the United States

OCTOBER TERM, 1969

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

THE SCHWARZENBACH-HUBER COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, THE SCHWARZENBACH-HUBER COMPANY IN OPPOSITION

This brief is submitted by respondent, The Schwarzenbach-Huber Company, in opposition to the petition of the Textile Workers Union of America, AFL-CIO, the intervenor in the court below, for a writ of certiorari to review the judgment of the United States Court of Appeals of the Second Circuit dated April 24, 1969. The National Labor Relations Board has not filed a petition for certiorari and has been joined as a respondent in the petition herein.

Questions Presented

1. Whether the petitioner-Union in fact had valid authorization cards from a majority of the employees in the bargaining unit?

2. Whether the respondent-employer's unfair labor practices had the tendency to so undermine majority strength and impede the election process that the possibility of erasing their effects and of assuring a fair rerun is so slight that employees' sentiment is better protected by a bargaining order than a collective bargaining election?

3. Whether the court below was correct in holding that the unfair labor practice findings stricken by it were not supported by substantial evidence on the record as a whole?

Statement of the Case

Following an extended organizational campaign by the petitioner, Textile Workers Union of America, AFL-CIO, the Charging Party and an intervenor in the proceedings in the court below (hereinafter referred to as the "Union"), a representation election on consent of the parties was held at the Altoona, Pennsylvania weaving plant of Respondent, The Schwarzenbach-Huber Company (hereinafter referred to as the "Employer") on March 16, 1967. *By a vote of 106 to 82, the employees rejected the Union as their collective bargaining representative.* Thereafter the Union filed objections to the election and an unfair labor charge which alleged that the Employer had violated Sections 8(a)(1), (2) and (5) of the National Labor Relations Act (hereinafter referred to as the "Act").

After a hearing a NLRB Trial Examiner found that the Employer had committed said unfair labor practices. The Trial Examiner's recommended order would have required the Employer to bargain with the Union as the representative of its employees, despite the Union's loss of the election. The Labor Board reviewed its Trial Examiner's decision and with a few minor modifications, adopted his findings, conclusions and recommendations in

a brief *per curiam* decision. It also adopted the Trial Examiner's recommendation as its order.

The Employer filed a petition for review of the Board determination in the United States Court of Appeals for the Second Circuit and the Board cross-petitioned for enforcement. On March 5, 1969 that court rendered a decision setting aside and refusing to enforce the bargaining order. That decision rested upon the court's holding (1) that the Union did not have a majority, (2) that the Employer's doubt that the Union had a majority was made in good faith, and (3) that the making of a bargaining order under the circumstances of this case would clearly not effectuate the purposes of the Act. It also set aside as not supported by substantial evidence on the record as a whole a number of the unfair labor practice findings of the Board, leaving extant only two minor unfair labor practice findings.

The conclusions of the Second Circuit with respect to the impropriety of the bargaining order rested upon the following factual basis:

(1) The Union's purported majority.

The Second Circuit's conclusion that the Union did not have a majority of the employees was based upon three different factual findings.

(a) The size of the unit.

The Second Circuit found that at the time the Union made a claim of majority status, the number of authorization cards signed by employees was less than a majority of the plant. This, in turn, is based upon that court's conclusion that the number of employees in the unit was 199. The Trial Examiner, in a finding undisturbed by the Board, had held that the unit was at least 197 and

did not indicate one way or the other whether two employees, Marjorie Krise and Vivian Becker were properly in the unit. If Mrs. Krise and Mrs. Becker are included in the unit, the unit becomes 199. The Second Circuit found that Mrs. Krise and Mrs. Becker should indeed be included within the unit. In so doing, they were responding to the invitation of counsel for the Union who requested that court at the oral argument either to make the determination of the proper status of these two ladies itself, or to remand the case for that purpose to the Labor Board.

We will not belabor this Court with the factual setting which led the Second Circuit to determine that Mrs. Krise and Mrs. Becker belonged in the unit since the sui generis circumstances of those two employees in no way involves the important issues of law which are the traditional province of this Court. Suffice it to say, if the Second Circuit's determination of this issue, which was not determined by the Labor Board, is correct then the Union had only 99 employees out of a unit of 199 who had signed authorization cards at the time it requested recognition as the bargaining representative of the employees. Further, all cards thereafter obtained by the Union were signed after the Union's false representation to the employees on February 10, 1967 that the Union had a majority. Accordingly, putting aside all else, the Second Circuit's determination of the status of Mrs. Krise and Mrs. Becker means that the bargaining order was invalidly made by the Labor Board.

(b) The Cards in the Possession of the Union

The Second Circuit analyzed the actual face and back of the authorization cards. Based upon the analysis of this physical evidence, it concluded that the Union had *in its possession,* as of February 9, 1968, only 98 cards

as opposed to the number of cards signed by employees but not yet delivered to the Union. This, in turn, means that even if we assume that Mrs. Krise and Mrs. Becker were not members of the unit, the Union did not have a majority at the time it made its demand for recognition and represented to the employees it had a majority. It only had 98 cards in its possession out of a unit of either 197 without Mrs. Krise and Mrs. Becker or 199 with Mrs. Krise and Mrs. Becker included. Thus, the validity of the bargaining order turns upon how many cards the Union had in its possession at the time it made its demand. The factual determination of the Second Circuit was based upon the undisputable physical evidence of the cards themselves.

(c) The Validity of the Cards

The Second Circuit specifically invalidated a number of the cards because they were vitiated by Union deceits and Union misrepresentations. Thus, the Second Circuit threw out the 35 cards signed at a meeting held on January 29, 1967.

The Union organizer, Mr. Carl Frazier, who spoke at that meeting to solicit the card signing, forcefully implanted in the minds of all the employees present that the cards were just to get a NLRB election. Thus, this is precisely what a number of employee witnesses recall from Mr. Frazier's speech (J. A. 87a, 105a-106a, 114a, 129a*). Although in answer to a rebuttal question by General Counsel, Frazier denied that he used the word "just" in commenting on the necessity of cards for an elec-

* J. A. references are to the Joint Appendix before the Second Circuit. A references are to the Appendix to the Petition for a Writ of Certiorari before this Court. P references are to the Petition for a Writ of Certiorari.

tion (J. A. 155a), the testimony of the employees present establishes that *he in fact, was successful in creating the impression in the minds of the employees that this was their only purpose.*

No statement was ever made that the cards could or would be used to assert a representation claim without an election. Just the contrary was implied when it was stated that should the Union not win an election, the cards would be returned to the employees (J. A. 130, 153a). *Certainly, no employee could have been expected to derive any other meaning from those remarks except that an election was the only purpose for which the cards were being sought.*

The Union's conscious attempt to conceal from employees the alternate purpose for which the cards might be put, is evidenced by the deliberate failure to give a meaningful answer to a question from an employee on the floor at the January 29th meeting asking directly whether the cards were only being sought for the purposes of an election. It would have been simple to truthfully answer that question with a "no", that they might also be used to demand recognition without an election. But instead, Mr. Frazier merely read what the card said.

While the legal import of the card may be clear to those sophisticated in labor law, there is no evidence to support the conclusion that these employees had any real understanding of the possible legal consequences of the phrase "hereby designate [the Union] as my representative for the purposes of collective bargaining ... ." On the contrary, the testimony of the employees reveals that the meaning was far from clear to them. The true meaning of signing an authorization card is a legal question, far beyond the experience or understanding of the average employee. The question which was asked from the floor and which was not answered directly would not

have been asked unless substantial doubt as to the effect of the cards had already existed in the minds of at least some of the employees. By failing to answer the question, the Union intentionally misled the prospective card signers at the meeting (J.A. 90a).

The Second Circuit went on to specifically invalidate the authorization cards of six named employees. Three of them, Jonas Corbin, Jr., William Slone, and Walter Delozier testified they had attended the January 29 meeting and their cards were invalidated because of their attendance at the meeting. The other three were thrown out by the Second Circuit "because of the pattern of misrepresentation, half-truths and evasiveness of the Union organizers" (A14-a).

William Nolan testified that when he received the card from employee McGraw, he was told that there would be an election (J. A. 139a). It was abundantly obvious from Mr. Nolan's testimony that he never intended to designate the Union which he thinks, in his own words, "stinks" (J. A. 139a) despite the fact that he signed a card. Patrick O'Hara testified that the employee, Raymond Guella, who had solicited his card, had told him that if he signed the card he would save the first year's fee and that the cards' purpose was to obtain a vote (J. A. 102a-104a). Ronald Tuddy gave similar evidence with respect to his solicitation (J. A. 135a-137a).

Thus, the final prop for the court below's decision concerning the majority status of the Union is its detailed analysis of six particular instances in which cards were vitiated by Union misrepresentation. As indicated by our discussion in (a) and (b), the Union majority was so tenuous, even assuming that the Union's factual contentions with respect to (a) and (b) are correct, the sustaining of the invalidation of any one of these six cards would substantiate the striking of the bargaining order.

(2) The Employer's Purported Bad Faith.

The Board's order rests upon its finding that the Employer had rejected the Union's demand for recognition in bad faith and hence was guilty of an unfair labor practice under § 8(a)(5) of the Act for refusing to bargain. Putting aside the fact discussed at length above that on February 9, 1967, the time of the only Union demand for recognition, the Union did not have a majority of employees, there is nothing to substantiate such a finding. Indeed, the only pertinent evidence in the record establishes that Plant Manager Brooks Taylor denied the Union demand for recognition based upon a number of circumstances which would have justified such a rejection (J. A. 76a-78a).

(3) The Effects of the Employer's Purported Unfair Labor Practices on a New Election.

The Second Circuit sustained two unfair labor practice findings of the Board, but these violations were of such a trivial nature that they could never have justified the drastic remedy of a bargaining order. The first was based upon the incident called by the Second Circuit "not one of great consequence", in which the Employer warned an employee for soliciting for the Union during working hours although employees were free to solicit when not working and to wear pro-Union buttons.

The second unfair labor practice concerned the existence for a period of some three months following the election of a now discontinued employees' committee. Obviously, such a violation after the election could not have caused the Union's decisive defeat in the election. The brief existence of the employees committee prior to its termination in July 1967 could, similarly, not have any effect upon an election to be held in late 1969.

The Union would have to have a lot more to justify a conclusion that a bargaining order is necessary to counteract the effects of an employer's unfair labor practices. Thus, it is asking this Court to review the Second Circuit's reversal of the Board's unfair labor practice findings. If we assume, for the sake of argument, that the Union is right in this contention, even then the Employer's actions were not such as to preclude a fair election. All the Employer was even charged with by the Board was based upon the following:

1. A series of group meetings held between employees and representatives of the Employer, although neither at such meetings nor on any other occasion was an employee threatened, interrogated, coerced or restrained in the exercise of his rights under the Act.

2. Isolated conversations between three employees who were arguably supervisors and three employees. No employee who was a party to such a conversation was either interrogated or threatened or considered himself to be interrogated or threatened. Of course, three such conversations have no practical effect on a unit of 199 employees.

3. A speech to each shift by the Company President during the election campaign.

4. A cartoon leaflet distributed to employees more than two weeks prior to the election (G. C. Ex. 5, J. A. 174a-175a).

5. Letters of March 9th and March 20th written to employees by Employer executives—one before and one *after* the election (G. C. Ex. 6, J. A. 176a-179a; G. C. Ex. 10, J. A. 185a).

But further, the facts upon which the Board based its reversed unfair labor practice conclusions not only demon-

strate the triviality of the purported unfair labor practice but also the correctness of the Second Circuit reversal of these conclusions.

Thus, the Second Circuit reversed the finding that Mr. Robert Schwarzenbach, the Employer's President, had conveyed a threat directly or indirectly that the plant would move or close if the employees voted for the Union. As the Second Circuit recognized the evidence in the Record refutes such a conclusion. Thus, General Counsel witness Clyde Brown specifically denied that such a statement was made (J. A. 68a-69a). In substances, from the testimony of General Counsel's own witnesses, it appears that while Mr. Schwarzenback told employees that he did not favor a Union and didn't think the Union was necessary, he took pains to assure employees that if the Union did win representation rights at the plant, he would try to work with them. To bolster these assurances, he went so far as to indicate that he had friends in the Union in Washington (J. A. 70a). The fact that Mr. Schwarzenbach pointed out in his speeches to employees that a large percentage of the New England textile industry had relocated in the South was simply a statement of fact and no statement was ever made that Schwarzenbach Huber would follow a similar course as a result of a Union victory. (See testimony of Randolph Thompson, J. A. 53a, and Richard Wiley, J. A. 64a.) Indeed, Mr. Schwarzenbach's assurances negate even any implication which employees on their own could have drawn from the history of the New England textile industry. Moreover, as the witnesses all recalled, the general tenor and emphasis of Mr. Schwarzenbach's speeches were not on what might or might not happen should the Union win the election, but rather a concern for the needs of the Employer to remain competitive in the face of possible Union demands.

Reference to the "Altoona Rayon" plant by the cartoon (Ex. 5, J. A. 174a-175a) must also be viewed in this same context. In the first place, nowhere in the record was it even suggested that the Altoona Rayon plant relocated or closed down because of the presence of the Union. The facts as stipulated (J. A. 72a-73a) indicate not that the plant closed down when the Union organized it, but simply that at the time it relocated it had been under contract with the Union for at least seven years. There is no evidence that the relocation of Altoona Rayon had anything to do with the Union. No witness testified, and General Counsel did not even attempt to prove, that any statement was made that the Employer would follow in the footsteps of Altoona Rayon because of the Union. Indeed, the testimony indicates that the discussion of Altoona Rayon took place not in Mr. Schwarzenbach's speech, but among the employees themselves following his speech (J. A. 64a-65a). No showing was made that Mr. Schwarzenbach instituted, participated or encouraged any such discussion by the employees following his speech.

Similarly in the absence of any proof that the Employer blamed the Union for the relocation of Altoona Rayon, the picture of the Schwarzenbach Huber plant and the Altoona Rayon plant in the cartoon (G. C. Ex. 5, J. A. 174a-175a) must be viewed merely as a reference to the necessity of remaining competitive (a concept repeatedly stressed by the Employer throughout its campaign and a concept which the employees were well aware of).

Likewise, the letters of March 9th and March 29th (G. C. Exs. 6 and 10, J. A. 176a-177a; J. A. 185a) to employees contain no threat that the plant would close or that jobs would be lost if the Union got in. Read in context and with relation to some of the other letters distributed by the Employer (for example, Resp. Ex. 9,

J. A. 204a-205a, the last communication to employees by the Employer before the Election), and the assurances made by Mr. Schwarzenbach in his speech, the letters contain no more than explanation of concern with regard to the Employer's competitive position in the event of organization.

The Second Circuit also reversed the Board's conclusions that the Employer had engaged in illegal interrogations of its weaving room employees at a series of small meetings. It is not disputed that at these meetings employer representatives (specifically Mr. Taylor, and Mr. Gerald Elden, The Employer's Vice President) invited discussions about employees' dissatisfaction with working conditions. As stated by all witnesses to those proceedings, what happened at those meetings was mainly an explanation by the Employer of existing benefits and a discussion of the Union propaganda. Any questions by the Employer were few and far between, general in nature and certainly non-coercive. Most of the questions originated from employees. However, there is not one shred of evidence that at any of these meetings any employee was asked or questioned about his membership in the Union, about his Union activities, or about his Union sentiments or about the Union activities and sentiments of any other employee. In all of the meetings, the only discussion at all with an employee regarding the Union occurred when either Mr. Taylor or Mr. Elden asked Mr. Melvin Kintz (a well spoken employee) why he thought he needed a Union to speak for him. The non-coercive atmosphere of such meetings is indicated by the General Counsel's own witnesses who described the discussions which took place. (See, Bradley, J. A. 45a-46a, Luther, J. A. 50a-51a, Thompson, J. A. 54a, Massini, J. A. 56a, Brown, J. A. 67a).

In addition, there were other scattered isolated incidents involving conversations between *one* employee out of a unit of 199 and a management representative.

Typical of the reversed unfair labor practice findings on such incidents was the one involving the conversation between Supervisor Lewis and Employee Bradley. On this incident, the Second Circuit stated:

> "Just about scraping the bottom of the barrel the Trial Examiner charges as a separate violation of Section 8(a)(1) a conversation between supervisor Lewis and employee Bradley. These two were old and constant, intimate friends. Each was the best man at the other's wedding. All this conversation amounts to is that Lewis, in the conversation with Bradley, referred to some of the group sessions in which some of the employees got the impression, or it was rumoured that 'there was going to be bumping in every department on the floor and also, there was going to be several bosses replaced.' As he knew Bradley was strong for the Union and he suspected Bradley would be President of the Union if the Union won the election, Lewis asked Bradley if there was any truth in these rumours. Bradley replied: 'I attended all the union meetings and not once did I hear any mention of any bosses being replaced.' Bradley also told Lewis that he had no intention of being President of the Union.
>
> "How this disposition of an idle rumour running around the plant can be inflated into an Unfair Labor Practice is beyond our comprehension." (A39a-49a)

Upon this record, the Union would now have this Court not only reinstate all the unfair labor practice findings stricken by the Second Circuit but also hold that such a collection of trivia would preclude the holding of a fair election.

ARGUMENT

The decision of the court below is not in conflict with the *Gissel Packing* decision.

The Union's essential position is that the opinion of the court below was in conflict with this Court's subsequently decided opinion in *NLRB* v. *Gissel Packing Co.*, 23 L. Ed. 2d 547 (1969). In this the Union is apparently in conflict with the Labor Board. In contrast to the Union's seeking a Writ of Certiorari herein, the Labor Board has, subsequent to the *Gissel* decision, paid the costs assessed against it by the Second Circuit and has not petitioned this Court for a Writ of Certiorari.

The Union's position is predicated upon its assumption that the facts of this case are entirely congruent with the facts of the cases reviewed in *Gissel*. Not only are the circumstances of this case different from those in *Gissel*, but these different facts preclude the issuance of a bargaining order precisely because of the standards enunciated by this Court in *Gissel*.

Of course, the Second Circuit in this case took a more hostile attitude towards bargaining orders based upon card checks than this Court did in *Gissel*. But upon examination, the determination of the Second Circuit is entirely consistent with *Gissel*. Indeed, were a similar case to be decided today, *Gissel* would mandate a similar result.

As we indicated earlier, the Second Circuit stated the issue before it in terms of three questions:

> "The propriety of enforcing an order to bargain after a union has lost a representation election depends on the resolution of three questions: (1) whether the Union in fact had a majority; (2) whether the employer refused to bargain because of a good faith doubt of such majority, if the

> Union had a majority; (3) whether on all the facts of the election situation a bargaining order is an appropriate remedy for enforcing the policy of the National Labor Relations Act." (A4a)

We will examine each of these three questions in turn to demonstrate the consistency of the Second Circuit's determination with the *Gissel* standards.

1. Did the Union Have a Majority?

We have pointed out in our discussion of the facts of this case the three-pronged basis for the Second Circuit's conclusion that the Union never had a majority. We need not spend much time on the first two bases concerning the size of the unit and the number of authorization cards possessed by the Union at the time it made its demand for recognition. Both issues are essentially one of fact and are in no way contradictory to *Gissel*. The Union's petition contends, however, that these issues are irrelevant since the Union obtained a majority *after* the demand for recognition (see P. 13-14). This argument ignores the fact that those employees who signed up after the demand for recognition did so after the Union had misrepresented to them that it represented a majority of employees (A4a). Obviously, such a statement would induce previously undecided employees to hop upon the apparently successful Union bandwagon and thus get the benefit of the waiver of Union dues. Of course, nothing in *Gissel* requires a court to honor union authorization cards obtained after such a material direct misrepresentation.

Most of the Union attention is directed to the Second Circuit's findings of misrepresentations which vitiated the cards of the 35 employees at the January 1967 meeting and the 6 named employees. The Union's position apparently is that authorization cards will be counted un-

less there is a direct misrepresentation made in so many words. But this is not what *Gissel* holds. On the contrary, that opinion took pains to make clear that the Board and the courts must examine the surrounding circumstances to determine the effect of the union statements upon the employees. Thus, this Court stated:

> "We agree, however, with the Board's own warnings in Levi Strauss, 172 NLRB no. 57, 68 LRRM 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule.[27]"

Footnote 27 states as follows:

> "In explaining and reaffirming the Cumberland Shoe doctrine in the context of unambiguous cards, the Board stated: 'Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or *indirectly expressed* representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose. . . .' The Board stated further in a footnote:
>
> "The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in haec verba that the "sole" or "only" purpose of the cards is to obtain an election. *The Board has*

> *never suggested such a mechanistic application of the foregoing principles,* as some have contended. *The Board looks to substance rather than to form. It is not the use or nonuse of certain key or "magic" words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.'* 172 NLRB No. 57, LRRM 1338, 1341, and n. 7. (Emphasis of insufficient and only contained in this Court's opinion. All other emphasis supplied)

This Court concluded with a warning to the Board not to adopt a more rigid view of the Cumberland Rule:

> "We nevertheless feel that the trial examiner's findings in General Steel (see n. 5, supra) represent the limits of the Cumberland rule's application. We emphasize that the Board should be careful to guard against an approach any more rigid than that in General Steel."

This warning simply echoed the statement of the Second Circuit herein:

> "It may be doubted that the courts deciding *Cumberland* and *Joy Silk* ever intended the rules enunciated in those cases to be applied 'so woodenly' as the Board did in this case and others, to use the expression of Judge Wisdom in *N. L. R. B.* v. *Southland Paint Company,* 394 F. 2d 717, 725 (5th Cir. 1968)." (A17a)

In the light of the record herein particularly concerning the circumstances of the January 29, 1967 meeting any determination that there was not a misrepresentation by the Union is, in the words of this Court, "a too easy

mechanical application of the Cumberland rule" and "an approach . . . more rigid than that in General Steel."

2. Was the Employer's Claim that the Union Lacked a Majority Made in Bad Faith?

The bargaining order imposed by the Trial Examiner and the Labor Board rested upon their conclusion that the Employer's refusal to recognize the Union was made in bad faith. Under this Court's decision in *Gissel,* such a question is no longer relevant. There this Court announced that the Board had abandoned his prior practices in cases such as this:

> "Although the Board's brief before this Court generally followed the approach as set out in Aaron Brothers, supra, the Board announced at oral argument that it had virtually abandoned the Joy Silk doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union." (at p. 567)

As a consequence, the Board's finding of an unfair labor practice based upon a so-called bad faith denial and the Union's request for recognition was contrary to the new Board practice specifically approved by this Court. Here, the true situation is precisely opposite to the characteri-

zation of the Union: the Board decision is contrary to this Court's opinion in *Gissel* and the Second Circuit decision is in conformity with it.

3. Is the Bargaining Order in this Case an Appropriate Remedy for Enforcing the Act?

In *Gissel* this Court indicated that where there were Employer unfair labor practices although not "outrageous" and "pervasive" the Board could still issue a bargaining order if these unfair labor practices "have the tendency to undermine majority strength and impede the election processes." This Court went on to indicate the circumstances to be considered by the Board:

> "In fashoning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order, then such an order should issue (see n. 32, supra).
>
> "We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no per se rule that the commission of any unfair practice will automatically result in a § 8 (a)(5) violation and the issuance of an order to bargain."

Obviously, if the Second Circuit's findings on the unfair labor practices are accepted, the two minor unfair labor practices sustained by the Second Circuit "would because of their minimal impact on the election machinery . . . not sustain a bargaining order." Most of the unfair labor practice findings rejected by the Second Circuit likewise fall into such a category particularly since this case involves a relatively large bargaining unit.

The Union (at P. 14-15) contends that a bargaining order should issue because of the alleged threats of the Employer to close the plant. The Union is hence seeking to have this Court first, reverse the Second Circuit's findings on those unfair labor practices and then hold that these reinstated findings require the issuance of a bargaining order.

In *Gissel* the Court sustained the finding both of the Board and the First Circuit in the *Sinclair* case that the employer's statement therein constituted a "threat of reprisal" and hence an unfair labor practice. In so doing, the Court pointed out the limitations of the Board's possible restriction on free speech:

> "But we do note then an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, §8(c) (29 USC §158(c) (1964 ed)) merely implements the First Amendment by requiring that the expression of 'any views, argument or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of §8(a) (1)." (at p. 580)

This Court went on to state what an employer is free to do:

> "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."

It is just such a conclusion that was made by the Second Circuit herein. Thus it found that the basis for the Employer's prediction was contained in a letter from the company President (quoted in full text in footnote 10) which set forth, in the language of the Second Circuit, "chapter and verse, mentioning details that no man in his senses would have dared to state if they were fabrications." (A35a). Thus, the Second Circuit herein applied precisely the test rearticulated in *Gissel*.

But even if this finding of the Second Circuit were to be reversed, it still does not mean that a bargaining order is called for. The Union contends (pp. 14-15) that "the very nature of the unfair labor practices requires that a bargaining order issue." As this Court stated in *Gissel* "there is . . . no per se rule that the commission of any unfair labor practice would automatically result in . . . the issuance of an order to bargain." Thus, the Labor Board order sought to be restored has no support in the type of findings which the Union is now requesting.

In addition to the restoration of the bargaining order, the Union petition also appears to seek the restoration of the unfair labor practice findings. The factual bases for them we have set forth in the Statement of the Case but we do not believe that we need spend any more time on the application of well-settled rules to essentially trivial unfair labor practice charges.

CONCLUSION

In June of this year, this Court rendered a detailed decision in this area. The opinion in question herein is, as we have demonstrated above, entirely consistent with that decision. The party most directly involved, the NLRB, is not seeking a review herein. Hence there is no reason for this Court now to review this decision and rearticulate the rules it has so recently announced.

Accordingly, for all the reasons stated herein, the Union's petition should be in all respects denied.

Respectfully submitted,

MARSHALL C. BERGER,
Attorney for Respondent,
The Schwarzenbach Huber Co.,
Office & P. O. Address,
767 Fifth Avenue,
New York, New York 10022
212—PL 8-7800

WEIL, GOTSHAL & MANGES,
ROBERT ABELOW,
Of Counsel.